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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

THE QUESTION OF TRANSNATIONAL CORPORATIONS

Report of the sessional working group on the working methods and activities of transnational corporations on its second session

Chairman-Rapporteur: Mr. El-Hadji Guissé

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Introduction

1. In accordance with its resolution 1998/8, the Sub-Commission on the Promotion and Protection of Human Rights established in 1999, for a period of three years, a sessional working group to examine the working methods and activities of transnational corporations.

2. The following experts were appointed as members of the working group: Mr. El-Hadji Guissé (Africa), Mr. Soo-Gil Park (Asia), Mr. David Weissbrodt (Western Europe and other States), Mr. Manuel Rodriguez-Cuadros (Latin America), and Mr. Vladimir Kartashkin (Eastern Europe).

3. The working group held three public meetings during its second session, on 1, 4 and 8 August 2000.

4. A representative of the Office of the High Commissioner for Human Rights opened the second session of the working group.

5. The Working Group elected Mr. El-Hadji Guissé as Chairman-Rapporteur.

6. The following members of the Sub-Commission who were not members of the working group also took part in the discussions: Mr. Asbjørn Eide, Ms. Françoise Jane Hampson, Mr. Godfrey Bayour Preware, Mr. Louis Joinet, Mr. Joseph Oloka-Onyango, Mr. Fried van Hoof, Ms. Deepika Udagama, Ms. Halima Embarek Warzazi, Mr. Yozo Yokota, Ms. Leila Zerrougui

7. The following specialized agency was represented at the session of the working group: International Labour Organization.

8. Representatives of the following non-governmental organizations in consultative status with the Economic and Social Council also participated in the meetings of the working group: American Association of Jurists, Centre Europe-Tiers Monde, Human Rights Advocates, Human Rights Watch, Indian Movement Tupaj Amaru, International Confederation of Free Trade Unions, Minnesota Advocates for Human Rights, Pax Romana.

9. The working group adopted the following agenda in 1999 for the duration of its mandate:

1. Election of officers.

2. Adoption of the agenda.

3. Activities of transnational corporations:

(a) Identification and examination of the effects of the activities of transnational corporations on the enjoyment of civil, cultural, economic, political and social rights, including the right to development, the right to a healthy environment and the right to peace;

(b) Gathering and examination of information, including any working paper, related to the effects of the activities of transnational corporations on the enjoyment of civil, cultural, economic, political and social rights, including the right to development, the right to a healthy environment and the right to peace;

(c) Preparation of a list, to be updated annually, of transnational corporations providing examples of their activities and indicating their positive and/or negative impacts on civil, cultural, economic, political and social rights, including the right to development, the right to a healthy environment and the right to peace, in countries in which they operate.

4. Present standards and standard-setting activities:

(a) Assessment of how the existing human rights standards apply to the activities of transnational corporations;

(b) Collection and analysis of the existing standards and standard-setting activities pertaining to the human rights aspects of the activities of transnational corporations, including those in other international bodies, NGO-based initiatives, business-related initiatives and private individuals' initiatives such as the MacBride Principles and the Sullivan Principles;

(c) Collection of the various international, regional and bilateral investment agreements in order to analyse their compatibility with human rights.

5. Conclusions and recommendations:

(a) Adoption of recommendations and proposals relating to the possibility of developing a code of conduct for transnational corporations, in order to ensure that their activities are in keeping with the promotion and protection of civil, cultural, economic, political and social rights;

(b) Defining the role of the United Nations, including appropriate implementation mechanisms, to ensure the compatibility of the activities of transnational corporations with human rights, including the right to development, the right to a healthy environment and the right to peace;

(c) Recommending the drafting and adoption of mechanisms in accordance with which host and home Governments would be obliged to elaborate internal legal monitoring standards in respect of the activities of transnational corporations;

(d) Analysis of the possible liability of States and transnational corporations that fail to fulfil their obligations.

6. Recommendations for the future work of the working group on the effects of the activities of transnational corporations on human rights, including the right to development and the right to a healthy environment.

7. Adoption of the report of the working group to the Sub-Commission.

10. The working group had before it for discussion three working papers drafted by Mr. Weissbrodt: "Principles relating to human rights conduct of companies" (E/CN.4/Sub.2/2000/WG.2/WP.1) and its two addenda containing background information and a list of existing sources of international standards drawn on in the preparation of the draft principles (E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 and Add.2). A written summary of an oral presentation by Mr. Guissé on the impact of the activities of transnational corporations (TNCs) on the enjoyment of all human rights was also made available to the working group. The working group also had before it the report on its first session (E/CN.4/Sub.2/1999/9).

I. IMPACT OF TRANSNATIONAL CORPORATIONS ON THE ENJOYMENT OF CIVIL, CULTURAL, ECONOMIC, POLITICAL AND SOCIAL RIGHTS

11. The Chairman-Rapporteur made an oral presentation on the impact of the activities of transnational corporations on the enjoyment of economic, social and cultural rights. He said that the working methods and activities of TNCs affected the enjoyment of human rights, including the right of people to self-determination. Self-determination involved the possibility of exercising sovereignty over natural resources and wealth, the right to development, the rights to health and welfare, and adequate living conditions. TNCs also had an impact on the physical and mental health of people, on employment and on working conditions, as well as on the right of association, the right to strike and the right to collective bargaining. They also had a significant bearing on scientific progress and its applications, and influenced the national and international social order.

12. The right to development was a comprehensive economic, social, cultural and political process, aimed at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. It was a reaffirmation of the interdependence and indivisibility of all human rights - civil, cultural, economic, political and social rights.

13. In an examination of the impact of the activities of TNCs, consideration should be given to what the possible consequences of those activities were on a community's economic rights and right to development, as well as on the right to a healthy environment. In the pursuit of economic activities, TNCs were not prepared to realize the right to solidarity, i.e., the right to development and the right to a healthy environment. The right to development implied the right of people to exercise sovereignty over natural resources. In that regard, TNCs should collaborate for the achievement of the right to development. Unfortunately, the trend was in the other direction: widespread and serious violation of the right to sovereignty over natural resources. At the same time, the integrated international production systems and the mobility of TNCs had increased their power of negotiation and reduced the decision-making power of States, particularly that of developing countries. In addition, TNCs were contributing to the undermining of economic and social equality. Negative behaviour on the part of TNCs was also

considered to be a factor impeding economic and social development in countries of the South. Slow technology transfer, lack of confidence and a negative level of investment in developing countries revealed that TNCs were holding back economic and social development. The right to development could only be conceived and achieved in a just international economic and social order. The current international order was dominated by TNCs.

14. The modalities and working methods of TNCs also had a profound impact on the right to a healthy environment. The problems of pollution of the seas, depletion of the ozone layer, global warming and a rise in sea level were a clear indication of various human rights violations particularly resulting from toxic wastes. TNCs were the major source of those toxic wastes. Further, TNCs were transferring those toxic wastes to regions such as Latin America and Africa where the environmental regulations were less stringent.

15. In addition to the impact of TNC activities on the community's rights, a close examination should also be made of their potential impact on individual rights, such as the rights to work, health and food. TNCs were expected to play a pivotal role in the development and protection of those rights. However, impact assessment of the activities of TNCs in that regard pointed in the other direction. According to International Labour Organization (ILO) estimates, some 1 billion workers were unemployed. The United Nations Conference on Trade and Development (UNCTAD) and ILO had also calculated that 3 per cent of total labour was employed by TNCs. Not enough jobs were being created by the TNCs. On the contrary, there had been massive lay-offs by TNCs in recent years. TNCs were systematically violating workers' rights by making abusive dismissals. Major problems such as those relating to technology transfer and capital flight revolved around the activities of TNCs in developing countries. It was therefore imperative to impose national and international regulations that were equally binding on all parties concerned. Another aspect of the problem lay with the international pharmaceutical companies, which were holding back much-needed drugs for some diseases including HIV/AIDS in developing countries. This was an obstacle to the enjoyment of the right to health and also posed a threat to the enjoyment of many other human rights. Furthermore, vulnerable groups such as women and children were profoundly affected by the activities of TNCs.

16. Another issue was that of the erosion of the cultural heritage of the third world in the globalization process, while Western culture extended its influence. Additionally, premature privatization was causing problems in the water and electricity sectors.

General comments by members of the working group and experts of the Sub-Commission

17. Members of the working group and other experts of the Sub-Commission made the following general comments.

18. The working group needed to examine not only the negative consequences of TNC activities but also their positive effects on the enjoyment of human rights. It was a paradox that there was an eager willingness on the part of developing countries to attract foreign direct investment whereas those countries were the most negatively affected by TNC activities. The task of the working group was to consider how the negative consequences of TNC activities

could be reduced and the positive effects enhanced. It was therefore important to focus not only on the negative effects, but also to formulate a constructive engagement with companies in the promotion and protection of human rights.

19. The negative impact of TNC activities, such as the undermining of Governments' genuine efforts to improve democratic and social development for their own interests, should be scrutinized. It should also be ensured that companies were not complicit in human rights abuses by increasing the resources available to repressive and undemocratic Governments.

20. With regard to the consequences of TNC activities, a consistent approach was required. A summary of existing research was needed to develop that approach. The working group should collect examples of best practices in regard to safeguarding human rights, and of the companies that used them.

21. In order to reduce the negative consequences, it was necessary to improve the capacity of States to apply human rights standards to TNC activities. In that regard, the consolidation of democracy or democratic stability had a huge potential to influence both the promotion and the violation of human rights.

22. Attention needed to be paid to companies that produced arms, which were a vicious cause of many human rights violations, including violations of the rights to life, property and freedom of movement. The production and transfer of arms should be regulated.

23. There was a need to address the consequences of TNC activities in the context of the right to peace, the right to development and the right to a healthy environment. In that regard, the work of the United Nations system, including that of the former United Nations Centre on Transnational Corporations should be also reflected in the work of the working group.

24. The role of States was affected by globalization. Many countries had no capacity or inadequate capacity to regulate the activities of TNCs, which gained comparative advantage in the globalization process. In particular, the impact of information technology on States' capacity to manage TNCs in a globalizing world should be closely examined.

Comments by NGOs

25. The working group should focus on the effects of the working methods and activities of TNCs on the enjoyment of all human rights, as a matter of the first priority. In particular, the working group should consider the impact of the activities of TNCs on indigenous peoples, including activities that could lead to the erosion of their cultural heritage.

II. DRAFT PRINCIPLES RELATING TO HUMAN RIGHTS CONDUCT OF COMPANIES

26. The fundamental rationale for the draft principles was that business enterprises had increased their power and with power should come responsibility. Hence, there was a need to consider what human rights duties should be expected of companies.

27. Although the initial mandate of the working group was to draft human rights standards for TNCs, some participants questioned why those standards should be applied only to TNCs and not to all companies, regardless of their corporate form and regardless of the international or domestic nature of their business. However, some members of the Sub-Commission preferred to focus only on TNCs. There was a considerable divergence of views on the issue.

28. A second issue was how to identify those human rights standards and the nature of the standards: principles, guidelines, rules or a code of conduct for companies. The most effective implementation would be for companies to take on the standards as a matter of their own business practices. In that regard, the title "human rights principles for companies" was used, although it might be less appropriate for a legally binding instrument.

29. A connected issue was whether the Sub-Commission should draft legally binding standards. There existed a number of non-binding standard-setting instruments. Particular reference was made to the considerable experience in that field of ILO, which had developed non-binding guidelines for multinational enterprises. It was necessary to have the input and involvement of companies, unions, NGOs and other interested parties in considering the appropriate legal nature of the document that the working group was drafting.

30. Another important issue was that of the obligation of Governments in relation to the activities of companies. The approach taken in the working paper could be summarized as follows: "While Governments have the principal responsibility to respect, ensure respect for, and promote internationally recognized human rights, companies shall also respect, ensure respect for, and promote international human rights within their respective spheres of activity and influence."

31. With regard to the scope of responsibility of companies, the draft principles covered a wide range of topics, encompassing war crimes, crimes against humanity and other crimes. They also featured the obligation of companies to avoid discrimination, harassment and abuse. The draft principles covered slavery, forced labour, and child labour. They further addressed how the duties of companies related to national sovereignty and the right of self-determination. Other topics covered were a healthy and safe work environment, fair and equal remuneration for employees, hours of work, freedom of association and the right to collective bargaining. The draft principles also covered consumer as well as environmental protection and human rights.

32. The author of the draft principles had not been asked to incorporate implementation measures in them. Nonetheless, they necessarily included some minimal implementation procedures, such as wide dissemination of the draft principles, training and encouragement of companies to adopt the standards as the basis for their own. However, it would be beneficial for the working group to consider additional approaches for effective implementation.

General comments by members of the working group and other experts of the Sub-Commission

33. Three essential aims of the draft principles were: (i) to help Governments identify what types of legislation they should enact and what types of enforcement mechanisms they should

implement to ensure the principles had a positive influence; (ii) to encourage companies to implement the draft principles; (iii) and to lay the groundwork for the binding international standard setting process.

34. With regard to the applicability of the draft principles, there were opposing views among the members or the experts. One view was that all companies should be bound by the principles; the other was that the principles should only apply to TNCs.

35. Those who held the former view argued that there were many types of companies and that it was extremely difficult to distinguish TNCs from national companies in most cases. Similarly, national companies had an equally important impact on the enjoyment of human rights. Further, in many countries, the major sources of human rights problems lay with subcontractors. Finally, TNCs were sufficiently adept at camouflaging their legal entity so as to appear as national companies and thus avoid being subject to international standards. TNCs had financial and other structures whereby they could hide their nature as TNCs, in order to avoid any claims, which might subject them to civil, administrative or criminal jurisdiction. Hence, companies' activities, irrespective of their legal and financial status, should be bound by the draft principles.

36. Those who held the other view argued that the mandate of the working group was confined to the activities of TNCs. They maintained that the impact that TNCs had on peoples' lives was different from that of domestic companies: locally based companies were more amenable to the domestic legal system, including labour and environmental law. Also they had a greater connection with the local community and a greater commitment to the wellbeing of the local community. Violations of labour rights such as the freedom of association and security of employment were more rampant in export processing zones (EPZs) where TNCs enjoyed a general advantage over others by benefiting from the looser regulation in EPZs. An examination of the qualitative nature of the activities of the different types of legal entities was therefore needed. The working group should conduct human rights impact studies on the activities of TNCs as compared to domestic companies.

37. With regard to the nature of the draft principles, a number of members of the working group strongly urged that they should be the basis for a legally binding code of conduct for the regulation of the activities of companies.

38. Another view put forward was that the preparation of a draft declaration could be considered. Thereafter, a legally binding treaty could be drafted, based on that draft declaration. The benefit of having voluntary principles at the current stage of the debate was recognized.

39. The role of national courts should be identified, given that existing international human rights standards might have already been incorporated in domestic law. It was therefore necessary to look at the jurisprudence of domestic courts in implementing those international human rights norms and standards.

40. With regard to States' obligations to protect human rights affected by companies' activities, the importance of preventive measures, sanctions for human rights violations and remedies for the victims of those violations was emphasized.

41. It was further stressed that the legal responsibility of home and host States should be adequately addressed. States might lack a legal, regulatory, investigatory infrastructure to take effective action. It was suggested that the international community should develop a system to assist development of such an infrastructure.

42. With regard to the monitoring of particular violations of human rights by companies, the assistance of NGOs in indicating the precise causes of problems in countries should be widely sought.

43. Avenues for the implementation of the draft principles at the national and international levels with regard to the activities of TNCs should be studied. Prevention and promotion should be also considered.

44. The draft principles should touch upon all possible problems relating to TNC activities. A list of violations by TNCs should be drawn up and further development of a legally binding instrument should be based on a study of the effects of TNC activities.

General comments by specialized agencies

45. The representative of ILO made a statement on ILO activities concerning the effects of the activities of multinational enterprises (MNEs) on the enjoyment of human rights, particularly relating to labour standards.

46. ILO had prepared country studies on the impact of globalization which examined the social impact of globalization in a number of countries at different levels of development and in various situations.

47. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy addressed the universal commitments of four entities: MNEs, workers' organizations, employer's organizations and Governments. It had two aims: to encourage the positive contributions MNEs could make to economic and social progress and to minimize and resolve the difficulties to which their operations, by their very nature, could give rise. The ILO Declaration provided that all four actors should respect the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. A wide range of topics were addressed in the ILO Declaration, such as employment promotion and security, equality of opportunity and treatment, occupational health and safety, freedom of association and collective bargaining, and wages, benefits and conditions of work.

48. With regard to the effects of the activities of MNEs on the enjoyment of human rights, a periodic survey was made by ILO to examine both negative and positive effects of MNE activities based on information received from Governments, workers and employers. The seventh survey was being undertaken. It focused inter alia on linkages between MNEs and national enterprises, and the impact of MNE activities on lower income groups and developing areas and on the enjoyment of workers' rights in export processing and free trade zones. ILO had also endorsed a programme of promotional activities to accompany the initiatives of MNEs

and small and medium enterprises (SMEs) in areas of convergence between internationally recognized human rights and labour standards, and the aims of socially responsible policy and programmes of enterprises.

49. With regard to implementation, ILO involved the private sector in a number of activities in consultation with workers, employers and Governments. Those activities included access to the ILO global knowledge based on standards, practices and national laws and regulations relating to labour and employment; training in more effective implementation of social policy and programmes of enterprises; and industrial cooperation on [illegible] ground, particularly in the area of the elimination of child labour. ILO also participated in the United Nations Secretary-General's Global Compact in the areas of freedom of association and collective bargaining, and abolition of child and forced labour and employment discrimination.

Comments by NGOs

50. The working group should focus on the effects of the activities of TNCs on the enjoyment of all human rights in line with the mandate given to the working group. It was therefore argued that the development of a code of conduct was premature at the current stage.

51. Diverging views were expressed by NGOs with regard to the applicability of the draft principles to companies. Some argued that the working group should focus on the activities of TNCs, given the enormous impact that those entities had on the enjoyment of human rights. On the other hand, there was a request to expand the applicability of the draft principles to all companies, not only TNCs.

52. A large majority of NGOs stressed the urgent need for a legally binding instrument to regulate the activities of TNCs. A voluntary code of conduct was not sufficient. In that connection, the working group should recommend to the Sub-Commission that a drafting committee be established to draft a treaty on the conduct of transnational companies. That would be a significant first step towards developing a legally binding document.

53. Such a legally binding instrument would provide a better means of ensuring compliance with the rules. It could also streamline the existing rules relating to the regulation of companies.

54. With regard to the nature of the draft principles, the advantages of a voluntary code of conduct at the current stage of the debate in the working group were pointed out. On the one hand, a hasty and over-ambitious drafting of a legally binding treaty would jeopardize the overall goal of the working group's work. On the other hand, it was stressed that the working group should adopt the draft principles next year.

55. It was also stressed that both home and host States had an obligation to regulate the conduct of third parties, including companies, with a view to protecting the human rights of individuals within their jurisdictions.

56. It was proposed that in addition to being potentially subject to jurisdiction in other locations, corporations should always be subject to jurisdiction in their country of incorporation for any alleged violations of human rights or of international environmental law, regardless of

where the violations occurred. In addition, it was proposed that the Sub-Commission should encourage the Hague Conference on Private International Law to take a more broad based approach regarding jurisdiction over human rights offenders. The preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters, which had been drawn up in October 1999 and would be discussed in June 2001, contained some language on human rights in article 18. However, that language only made reference to the most egregious violations of human rights, such as war crimes and grave violations of fundamental rights. Corporations should be held accountable for other human rights violations which did not necessarily fit within those categories, such as violation of the right to a healthy environment.

57. It was also proposed that the role that different human rights mechanisms, such as the Committee on Economic, Social and Cultural Rights or mechanisms to implement conventions concerning the environment, could play should be analysed.

58. The following specific comments were made relating to the draft principles:

Consideration should be given to including an express guarantee of the rights of indigenous people;

Article 3 should include as stakeholders the public and private lending institutions, which were a potentially positive influence;

Article 7 should include benefit from the illegal acts of others;

Section D of the draft principles relating to discrimination in employment should include a clause on access for the disabled which would require employers to provide reasonable accommodation to the disabled;

Article 10 of the draft principles might run the risk of privatizing justice by allowing companies to conduct investigations on matters that should be resolved by an independent judicial entity;

With regard to articles 12 and 13, specific reference should be made to all eight core ILO conventions;

Article 16 should include the responsibility of a company to seek awareness of and inform itself on the local human rights conditions so that it did not become complicit in human rights abuses;

Article 22 might further legitimize the private militia by allowing them to have private security guard arrangements;

In article 25, reduction of wages for disciplinary measures should not be permitted;

In article 27, the phrase "are prescribed by law" should be removed, considering that there were a number of regimes against freedom of association.

Regarding article 33 of the draft principles, concern was expressed about the non-committal language: "where possible" and "generally". It was suggested that the language should read: "Companies must undertake environmental and social assessments and prepare long-term capital investment reports on a periodic basis (preferably annually or biannually). Companies must distribute such reports in a timely manner and in a manner that is accessible to the target audience. Copies must be distributed to the United Nations Environment Programme, the International Labour Organization, any other interested international bodies, the national Government hosting the multinational company, the national Government where the multinational is incorporated and all other affected groups as determined by an independent consultant. The reports should be made available to the general public";

Article 37 should request that oral and written communications should be made. In the same article, "To the extent of their resources and capabilities" should be deleted;

Article 38 should be strengthened with regard to the business relationship with subcontractors and suppliers, because they caused labour problems in many cases;

Article 39 needed to have a stronger implementation mechanism.

III. RECOMMENDATIONS FOR FUTURE WORK OF THE WORKING GROUP

59. It was strongly recommended that more time be allocated for the meetings of the working group to permit an in-depth debate on the issues. The meetings could take place before, after or during the Sub-Commission, with the participation of other actors such as NGOs.

60. The working group should continue to consider the various diverging views with regard to the scope of the mandate. In that context, several additional working papers and actions, described in paragraph 61 below, were agreed upon.

61. The working group decided to invite Mr. El-Hadji Guissé to revise and update his working paper on the consequences of the working methods and activities of transnational corporations as well as the responsibility of States and TNCs with regard to the violation of all human rights. It welcomed the offer of Mr. Asbjørn Eide to prepare a working paper on procedures for the implementation of standards on the human rights conduct of companies and requested him to do so; and it invited Mr. David Weissbrodt to revise and update his draft standards on the human rights conduct of companies, in the light of the need for more detail on ways to implement them. Each of those experts was invited to consult with relevant special rapporteurs, working groups, treaty bodies, United Nations agencies and non-governmental organizations in preparing their working papers and also to take into account the comments made at the second session of the sessional working group. Furthermore, Governments, non-governmental organizations, and other interested parties, including the International Labour Organization, were invited to transmit their updated studies and information on the consequences of the working methods and activities of transnational corporations. Non-governmental organizations were further invited to submit comments to the three Sub-Commission experts who would be cooperating in preparing papers, without financial implication, including through

meetings and seminars before the next session of the Sub-Commission, and each expert was invited to submit his revised working paper to the sessional working group and the Sub-Commission at their next sessions.

62. The working group considered that it would be useful to prepare a glossary explaining the terminology regarding the criteria and activities of TNCs.

IV. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

63. At its final meeting, the working group adopted the present report to the Sub-Commission on the Promotion and Protection of Human Rights.